

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDGAR LAVERDE,

Plaintiff,

-against-

CAPITAL ONE HEALTHCARE FINANCE, A
DIVISION OF CAPITAL ONE SERVICES, INC.,
AND CIT GROUP INC.,

Defendants.

No. 07 Civ. 4838 (BSJ) (GWG)

ECF Case

DECLARATION OF JAMES M. BERGIN

I, James M. Bergin, hereby declare as follows:

1. I am a member of the firm of Morrison & Foerster LLP, with offices at 1290 Avenue of the Americas, New York, New York. I and my firm serve as counsel in this action for defendants Capital One F.S.B. (erroneously sued herein as Capital One Healthcare Finance) (“Capital One”) and CIT Bank (erroneously sued herein as “CIT Group Inc.”) (“CIT”). I am a member of the bar of the State of New York and am admitted to practice before this Court. I am fully familiar with the proceedings in this action and with a prior proceeding involving all of the parties to this action, entitled *Edgar Laverde v. Vital Dent, Capital One Healthcare Finance, Richard Fairbank, CIT Group Inc., Jeffrey M. Peek*, No. 06 Civ. 7617 (referred to herein as “*Laverde v. Vital Dent et al.*”). I make this declaration based on personal knowledge.

2. I submit this declaration to call the Court's attention to (1) certain of the papers and proceedings in *Laverde v. Vital Dent et al.*, which are relevant to Defendants' request for a dismissal of portions of Plaintiff's present complaint on grounds of *res judicata*, and (2) the

documents establishing and disclosing the terms of the healthcare loan at issue in this action, which were produced by Plaintiff's counsel herein and are pertinent to Defendants' motion to dismiss.

3. Plaintiff filed his complaint in *Laverde v. Vital Dent et al.* on September 21, 2006. A true and correct copy of that complaint is attached hereto as Exhibit 1. A comparison of the factual allegations of that complaint (found at paragraphs 8-12 of Exhibit 1) with the facts alleged in the present Complaint makes clear that both actions involve the same healthcare loan transaction.

4. On December 13, 2006, Capital One and CIT moved to dismiss all claims asserted against them in *Laverde v. Vital Dent et al.* That motion was argued before Judge George B. Daniels on March 29, 2007.

5. At oral argument, Judge Daniels dismissed all of Plaintiff's claims against Capital One and CIT. As indicated in Judge Daniels' subsequent written order, the dismissal was with prejudice as to CIT; however, Judge Daniels authorized Plaintiff, within 30 days, to move for leave to amend his complaint against Capital One. A true and correct copy of Judge Daniels' March 29, 2007 order is attached hereto as Exhibit 2.

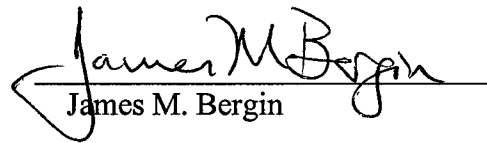
6. Plaintiff failed to move for leave to amend his original complaint within thirty days. Subsequently, however, Plaintiff's counsel wrote a letter to Judge Daniels, requesting permission to file a proposed amended complaint asserting claims against both Capital One and CIT. True and correct copies of counsel's letter to Judge Daniels and the proposed amended complaint are attached hereto as Exhibit 3.

7. On May 24, 2007, Judge Daniels denied leave to file the proposed amended complaint. A true and correct copy of Judge Daniels' order is attached hereto as Exhibit 4. Soon thereafter, Plaintiff filed the present action.

8. On July 16, 2007, my firm received from Shmuel Klein, counsel for Plaintiff in this action, a document entitled "Edgar Laverde Rule 26(a) Initial Disclosures" ("Plaintiff's Initial Disclosures"). Attached to Plaintiff's Initial Disclosures were certain documents numbered "01" through "26." Included among these documents were: (i) a document entitled "Capital One Healthcare Financing Authorization Form," bearing the signature reading "Edgar Laverde" and hand-dated "3/6/06"; (ii) a document entitled "Capital One Promissory Note And Disclosure"; and (iii) a document entitled "Capital One Truth-In-Lending Disclosures." As received from Plaintiff's counsel, the foregoing documents bear the numbers "18," "19," and "20," respectively. True and correct copies of these documents are attached hereto as Exhibit 5.

9. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of August, 2007, in New York, New York.


James M. Bergin